

No. 5745

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC HUNTING AND FISHING COMPANY,
an Oregon corporation,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF THE CASE.

This was one of the sealing cases tried before Judge Bourquin in which a judgment was rendered in favor of defendant from which an appeal was taken to this Court, the case being No. 5075, and was joined with other sealing cases on appeal, under the title of *Ellen Bird, et al. v. United States of America*, No. 5067 and reported in 24 Fed. Rep. 2nd Series, 933, Justice Dietrich wrote the opinion in which he said:

“The Pacific Hunting & Fishing Co., Case. No. 5075, involves a voyage of the Schooner Bessie Rutter in 1891. If in addition to the showing made by official records we accept the testimony of one Spexarth, managing owner for the corpo-

ration of the schooner, the plaintiff was organized for the purpose of carrying on the business of seal hunting and built the schooner for this purpose. She was not suitable for and never engaged in any other trade. She cleared from Astoria March 17th, 1891, for a sealing expedition in the Bering Sea; at least such were the instructions of the owner to the master. She carried a crew of fourteen and four hunting boats, and was provisioned and otherwise equipped for sealing. In the crew were four hunters. The President issued a proclamation against sealing in Bering Sea on June 15, 1891. Thereafter, on June 29th, 1891, and before she reached Bering Sea the schooner was boarded by naval officers who delivered to the master a copy of the Proclamation together with 'warning'. She did not go into Bering Sea and returned to port in July. There was no contradictory evidence and nothing to impeach Spexarth.

We think a finding of a voyage to Bering Sea effectually interfered with by defendant upon a sealing charge could not be reasonably refused. The evidence of damage or loss, however, consisted only of the stipulation referred to, and upon that ground alone judgment should be affirmed."

24 *Fed. Rep.*, 2nd Series, 938.

This is a clear statement of the case.

Justices Gilbert and Rudkin concurring in part with Justice Dietrich's decision, said:

"Judge Dietrich finds that there was no interference in certain of these cases, that there was certain interference in certain other cases, and that in all of the cases the proof of damages was insufficient. We concur in these findings and

conclusions, and also concur in the opinions where no interference was found—but in the remaining cases a new trial should be granted. And while the testimony was insufficient to enable the Court to fix definitely the amount of damages we think that substantial damages were shown, and that an affirmance of the judgments would result in a miscarriage of justice.”

Upon this decision this case with several others was reversed and sent back for a new trial.

At the trial plaintiff offered in evidence the same testimony given at the former trial and the further testimony of Captain Fredrick G. Dodge of the United States Coast Guard Service who was on active duty for the Government patrolling in Bering Sea, Arctic Ocean and North Pacific Ocean from the year 1887 to about 1922.

At the trial to meet the objections made by Judge Dietrich in his opinion that proper damages had not been shown the following stipulations were entered into between plaintiff and defendant:

“II. It is further stipulated, that the pelagic fur seal hunting season in the Bering Sea begins about the first day of July and extends to about the middle of September in each season between the years 1886 and 1893, inclusive.

III. And further, that the average catch of fur seal per small hunting boat during the said season of each of the said years within that zone would have been as follows: If a boat were manned by a hunter and two seamen, the average catch for the entire season would be three hundred seals; if manned by a hunter and one sea-

man, two hundred seals; and if the boat were operated by one hunter alone, the average catch would be one hundred seals.

IV. It is further stipulated, that the value of sealskins to the owner of the sealing vessel during the year 1891 was \$14.233 per skin.

V. It is further stipulated, that the average cost of shooting a fur seal at the times involved in the present action was five cents per seal; and that the average cost of feeding the men constituting the crew of the vessel at the times involved was fifteen cents per day per man;

And that the defendant is entitled to a deduction from the damages allowed in the foregoing amount per day for each day that said vessel arrived at its home port—in Puget Sound prior to September 22, or at San Francisco prior to September 27.

Dated: This 17th day of July, 1927.

J. N. Gillett,
H. H. North,
Attorneys for Plaintiff.

Geo. J. Hatfield,
United States Attorney,
By Esther B. Phillips,
Assistant U. S. Attorney,
Attorneys for Defendant.”

(Trans. 7-8.)

Defendants did not call a single witness and only offered in evidence three public documents found on pages 41, 42, 43 and 44 of Transcript and known as Exhibit No. 1, Exhibit No. 2 and Exhibit No. 3.

Exhibit No. 1 showing the date on which the Bessie Rutter cleared, being March 17, 1891, and the date she entered her home port, being July 20th, 1891;

Exhibit No. 2 showing a manifest of the cargo consisting of 4 breech-loading shotguns; 4 rifles; 30,000 wads, 21,000 primers; 6 kegs powder; 1 keg blasting powder; 21 sacks of shot, and certifies "that a bond had been taken in the sum of one thousand dollars to protect the United States regarding the violation of the law governing trade with Alaska." Exhibit No. 3 was a "Coasting Manifest".

ASSIGNMENT OF ERRORS.

The Court erred in finding for defendant and in not giving judgment to plaintiff upon the ground that the uncontradicted evidence in the case entitled plaintiff to a judgment in its favor.

The Court erred in making the following finding of fact to wit: That at no time did said vessel (the "Bessie Rutter") engage in or undertake a voyage to Bering Sea for fur sealing.

The Court erred in finding that the boarding and warning of the "Bessie Rutter" on June 29, 1891, at a point near the Popoff Islands in the North Pacific Ocean south of Bering Sea by an officer of the United States vessel "Thetis", acting upon the advice and instructions of the defendant, who gave a warning and prohibition to the master of the "Bessie Rutter" against entering the waters of Bering Sea for the purpose of fur seal hunting, did not interfere with the proposed voyage of the "Bessie Rutter" in that said vessel was not engaged in a voyage to Bering Sea.

The Court erred in finding that plaintiff's vessel, the "Bessie Rutter", at no time did engage in, or undertake a voyage to Bering Sea for fur sealing, when the uncontradicted evidence showed that the said vessel was bound for Bering Sea on a fur sealing voyage and that said voyage was interrupted and prevented by the action of the defendant.

The Court erred in finding as a conclusion of law that the owner of the schooner "Bessie Rutter" is not entitled to damages.

The Court erred in rejecting plaintiff's proposed special finding of fact II, submitted to the Court as an amendment to its proposed findings on the ground that the uncontradicted evidence established the fact that the defendant wrongfully and unlawfully interfered with the sealing voyage referred to and set forth in plaintiff's complaint, and that because of such warning and threats of seizure the master of the "Bessie Rutter" abandoned said sealing voyage into Bering Sea and returned to its home port about July 20, 1891.

The Court erred in rejecting plaintiff's proposed special finding of fact III submitted to the Court on the ground that the uncontradicted evidence established the fact that because of the wrongful and unlawful interference with the said voyage of the said schooner "Bessie Rutter" by the defendant the said plaintiff was damaged in the sum of \$16,870.50.

The Court erred in rejecting plaintiff's petition for a rehearing and resubmission of the case, and in not

exercising a sound judicial discretion by permitting a reopening of the case for the introduction of further testimony which had already been taken by deposition on stipulation in order to avoid a miscarriage of justice.

The Court erred in denying plaintiff's motion to withdraw, vacate and set aside its opinion rendered in defendant's favor on October 29, 1928, and in place thereof to give judgment to plaintiff upon the ground that the uncontradicted evidence in the case established plaintiff's right to a judgment in its favor to which ruling plaintiff duly excepted and which exception was allowed by the Court.

The Court erred in ordering judgment to be entered for the defendant.

That plaintiff remonstrated against and took exception to said findings, rulings and decisions upon the ground that the same were not warranted by or supported by any evidence whatever and are contrary to the uncontradicted evidence of the case.

To all of which plaintiff duly excepted and said exceptions were allowed by the Court (Trans. 65-68).

I.

THE COURT ERRED IN FINDING "THAT AT NO TIME DID SAID VESSEL ENGAGE IN OR UNDERTAKE A VOYAGE TO BERING SEA FOR FUR SEALING".

The foregoing finding is contrary to the uncontradicted and undisputed evidence in the case and is

not supported by any evidence whatever, and plaintiff duly excepted to it which exception was allowed by the Court.

We will now call the Court's attention to the undisputed and uncontradicted evidence showing that the plaintiff on March 17, 1891, sent its schooner, the "Bessie Rutter" on a sealing voyage to Bering Sea.

The depositions of A. G. Spexarth, a witness on behalf of plaintiff, was taken on April 9, 1925, and on July 13, 1926. We call the Court's attention to the testimony given by him in his first deposition which is found commencing on page 27 of the transcript:

"Direct Examination.

My name is A. G. Spexarth and I reside at Astoria, Oregon. I am an American citizen. I was living at Astoria in 1891. I was connected with the plaintiff, the Pacific Hunting & Fishing Company, an Oregon corporation. It was organized under the laws of the State of Oregon for the purpose of seal-hunting in the Bering Sea.

In 1891 this company owned a schooner called the 'Bessie Rutter,' about 35 tons. Our company built the schooner for sealing. On March 17th she cleared from the port of Astoria on a fur-sealing expedition bound for Bering Sea. Her master was Henry Olsen and I instructed him that he was to go sealing in Bering Sea. There were 14 in the crew and she carried four hunting boats and was provided and equipped for a voyage of from eight to ten months. Four of the crew were good hunters.

Q. Of course you have no knowledge yourself as to whether they got into Bering Sea or not?

A. No.

Q. Do you remember when she returned into port?

A. She returned in the late summer—in July.”

* * * * *

“Q. She did not get into the Bering Sea?

A. No, not at all.”

* * * * *

“Q. In 1891 was the date of the incorporation of this company? A. Yes, sir.

Q. And 1891 was also the date of the building of this vessel? A. Yes, sir.

Q. And the \$10,000 paid into the capital you referred to, was this wholly for the construction of this vessel and her equipment? A. Yes, sir.

Q. And fitting her out?

A. Yes, fitting her out for sea.

Q. With stores and everything for hunting and fishing voyage; is that true?

A. Yes, sir. * * *

Q. Do I understand that the schooner ‘Bessie Rutter’ which is the vessel you constructed, left Astoria in the spring of 1891 for a hunting and sealing voyage?

A. Yes, for hunting and sealing.

Q. And that she carried four hunting boats and had 14 men? A. Yes, sir.

Q. And of these men four were hunters?

A. Four hunters, yes.”

The company owned no other property except this vessel. It was a \$10,000 corporation and the money was paid out for the building of the vessel and fitting her out for sea with stores and everything for a hunting and fishing voyage.

The ‘Bessie Rutter’ left Astoria in the spring of 1891 for a hunting and fishing voyage. She carried four hunting boats and had 14 men, four of whom were hunters.

“Q. Now, in the spring of 1891 when this vessel left port, how were you connected with the company other than as a stockholder?

A. In no other way except that I furnished the supplies. That was a private affair.

Q. Were you managing the vessel?

A. I was managing the vessel on shore, but I was not aboard.

Q. Did you issue instructions to the master as to where he was to go and what he was to do?

A. Yes, sir.

Q. Was that part of your shore management?

A. Yes, sir.

Q. Just what did you instruct the captain to do?

A. The captain was instructed to proceed to the Bering Sea and had all the things that were necessary to prosecute the voyage; also some minute instructions were given as to the use of the fishing nets that were put aboard—to catch seal with the net. * * *

Q. In whose name as owner was this vessel documented?

A. Myself as managing owner. The other stockholders were American citizens."

"Redirect Examination.

"At the time the 'Bessie Rutter' was fitted out for the voyage I was president of the corporation. This vessel was originally owned by private ownership. Mr. Freeman was an American citizen and the others were naturalized citizens.

At the time of the interference with the voyage of the 'Bessie Rutter' of 1891 the stockholders of Pacific Hunting & Fishing Company were Henry Olsen, 62 shares; A. G. Spexarth, 93 shares; Samuel Freeman, 62 shares, and Theodore Bracker, 186 shares; and also, Theodore Bracker had acquired at that time 93 shares from William Olsen.

Recross Examination by Mr. Maytham.

Q. Was this vessel ever engaged in any other work than in sealing and hunting?

A. No, sir; the vessel was not suitable for any other trade; it was only 35 ton."

The Court, after making its finding "that at no time did said vessel engage in or undertake a voyage to Bering Sea for fur sealing" made the following finding No. III:

"On June 29, 1891, the 'Bessie Rutter' had reached a point near the Popoff Islands in the North Pacific Ocean, South of Bering Sea, and at that time and place, the schooner was boarded by an officer of the United States Vessel 'Thetis', upon the advice and instructions of the defendant, and that a warning and prohibition was then delivered to the master of the 'Bessie Rutter' by said officer of the 'Thetis' against entering the waters of Bering Sea for the purpose of fur seal hunting." (Tr. 10-11.)

Here is a direct finding that the defendant through its naval officers boarded the "Bessie Rutter" and warned its master not to enter Bering Sea to hunt for seal and the uncontradicted evidence shows that this warning was heeded and complied with and that the "Bessie Rutter" returned to her home port reaching there on the 20th of July, 1891, as shown by defendant's Exhibit No. 1 found on page 41 of the Transcript.

The only question is: "Was the 'Bessie Rutter' on a sealing voyage bound for Bering Sea" and we contend that the uncontradicted and unimpeached evi-

dence in the case conclusively proves that she was and, therefore, the Court erred in finding "That at no time did said vessel engage in or undertake a voyage to Bering Sea for fur sealing"; and also, committed error in rejecting plaintiff's proposed finding submitted to it which was as follows:

"On or about the 17th day of March, 1891, the plaintiff cleared said vessel for a voyage to hunt for fur seal in the North Pacific Ocean and Bering Sea and on June 29th, 1891, while on said voyage and near the Popoff Islands in the North Pacific Ocean, she was boarded by an officer of the United States vessel 'Thetis', who acting upon the advice of and instructions from the defendant boarded the 'Bessie Rutter' and then and there delivered to her master a warning against entering the waters of Bering Sea for the purpose of fur seal hunting on pain of the seizure and forfeiture of the said 'Bessie Rutter' for so doing. That because of such warning and threats of seizure the master of the 'Bessie Rutter' abandoned said sealing voyage into Bering Sea and returned to its home port, Astoria, Oregon, about July 20th, 1891." (Transcript 59.)

As already referred to this Court has decided, basing its decision upon the evidence hereinbefore set forth, in reversing the decision rendered by Judge Bourquin, that the "Bessie Rutter" "cleared from Astoria March 17, 1891, for a *sealing expedition in the Bering Sea*" and that "thereafter, on June 29th, 1891, and before she reached Bering Sea, the schooner was boarded by naval officers who delivered to the master a copy of the Proclamation together with warnings. We think a finding of a voyage to Bering

Sea effectually interfered with by defendant upon a sealing charge could not be reasonably refused." *The Pacific Hunting & Fishing Company*, Case No. 5075, Vol. 24, Fed. Rep., 2d Series, 938.

At the trial counsel for defendant contended that because it appeared from Defendant's Exhibit No. 1, (page 41 Transcript) that the "Bessie Rutter" cleared from Astoria, Oregon, destination Sand Point, Alaska, that her owners never intended a voyage to Bering Sea.

This was a proper clearance and under it and the law and the rules and regulation of commerce, the "Bessie Rutter" could hunt for fur seal on the high seas and in Bering Sea. This is clearly shown by the testimony of plaintiff's witness Captain Dodge who at that time and for years prior thereto and afterwards was in the Coast Guard Service operating in Bering Sea and the North Pacific Coast.

He gave the following testimony:

"In 1887 I entered the Coast Guard Service as a cadet, and in 1927, I retired as a Commodore in the Coast Guard Service.

Q. Is it a part of the duty of the Coast Guard officers to examine ship's papers?

A. That is one of their primary duties. A coast guard officer is also an inspector of customs and he has the same authority as a collector of customs.

Q. When you were at the cadet school did you make a study of the navigation laws of the United States?

A. That was one of our primary duties, to study the navigation laws and ship's papers of

all kinds; a coast guard officer is supposed to be an expert on those things.

Q. What would be the significance of a schooner, sailing schooner, clearing from Astoria for Sand Point, Alaska, the vessel being a registered vessel?

A. That would signify that Sand Point, Alaska would be her first point of call; she would touch there first after leaving Astoria; if the vessel was going to proceed from there she would clear from there for another port wherever she chose to go and obtain clearance papers there.

The COURT. In other words, it is put under a legal obligation to go to the port to which it has cleared?

A. To which it has cleared.

Q. Having accomplished that it is under no obligations to go to any particular place?

A. No; after that when she arrives at that port the law compels her to enter the vessel there, and if he does not report to the collector of customs her arrival there inside of 24 hours she is subject to a fine; *if he is trading he may obtain cargo there for the next port. Or, he may go to another cargo port. Or, he may go whaling or hunting.*

Q. Is there any other significance than that Sand Point was their first point of touching?

A. Only that she cleared for that point and he would be under the duty of going to that port and presenting her clearance or ship papers." (Trans. 45, 46 and 47.)

"Cross Examination.

"Q. The sealing business up there, was there any distinction made particularly as to the privilege of a vessel that was enrolled, a vessel that was registered, and the vessel that was licensed in the coasting trade? A. None, whatever.

Q. That is, vessels that were up there, could do any one of those things whatever her papers were?

A. Any one of them, as long as the papers were all right. If she had papers under registry she could engage in sealing if she was under enrollment or under license 20 tons." (Transcript 49.)

On redirect examination he testified as follows:

"Mr. NORTH. * * * Q. I will show you these exhibits 1, 2 and 3 of the United States, and ask you to examine them, Captain.

A. That is a manifest of the schooner's cargo, bound from Astoria to Sand Point; that is a clearance, and this is a coasting manifest.

Q. Do you observe anything on these papers that would show anything except the intention to stop at Sand Point after leaving Astoria, Oregon?

A. Yes, there is a manifest here that shows she had guns and rifles, primers, powder, etc.; there is nothing on that coastwise manifest that would indicate that she was doing anything except going on a hunting voyage, I should say.

Q. Isn't it a fact that the majority of the registered vessels that came under your inspection simply cleared for hunting and fishing?

A. Most of them engaged in fishing cleared for hunting and fishing.

Q. *But this (showing plaintiff's exhibit, the clearance for Sand Point) would be a perfectly proper paper for a vessel that was intending to hunt seal in the Bering Sea?*

A. Yes, sir." (Transcript 50-51.)

This testimony of Captain Dodge was not contradicted by any witness and no evidence was offered to the contrary and is fully supported by the law and

the rules and regulations of commerce existing at that time and which exists today.

If this clearance of the "Bessie Rutter" was a proper clearance, as testified to by Captain Dodge, "*For a vessel that was intending to hunt seal in the Bering Sea,*" then no inference can, in the absence of other evidence or circumstances, be drawn that the "Bessie Rutter" did not intend a voyage to Bering Sea. All the evidence in the case clearly proves that this must have been her intention and this Court in its decision in the *Bird Case, et al.*, hereinbefore referred to, has so held.

On cross-examination, Mr. Spexarth was asked the following question, and gave the following answer:

"Q. Was this vessel ever engaged in any other work than sealing and hunting?"

A. No sir; the vessel was not suitable for any trade; it was only 35 ton." (Transcript 32.)

Defendant's Exhibit No. 2, being "Bessie Rutter's" Manifest, and found on page 42 of the Transcript, shows that the cargo on board consisted only of four breech-loading shotguns, 4 rifles and ammunition for the same, and that a bond had been taken in the sum of one thousand dollars to protect the Government regarding the violation of the laws which prohibited the sale of arms and ammunition in Alaska. She carried no cargo to Alaska and went to Sand Point and received no cargo there. She was a hunting vessel on a seal-hunting voyage, and carried a crew of fourteen, four of whom were hunters.

That she was on a sealing voyage, no matter how her clearance papers may have read, is conclusively shown by plaintiff's exhibit No. 6 on file with the records on this appeal being a "map showing positions of sealing vessels seized or warned by the Government of the United States during the season of 1891." This map was prepared at the office of the U. S. Coast and Geodetic Survey from official reports in the possession of the State Department and is an official document.

This map shows sealing vessels that were "seized or warned" by the gunboats of the defendant in 1891 and the "Bessie Rutter" appears on the map as having been warned on June 29th, 1891, by the U. S. S. Thetis. Many other sealing vessels, as shown by this map, were warned on June 26, 27, 28, 29 and 30 at or near where the "Bessie Rutter" was warned. All were following the sealherd on its way to Bering Sea which would arrive there about July 1st and when she was warned she was right in the midst of the sealherd on its way to Bering Sea as shown by the migration chart of seal prepared by the Government and introduced in evidence as Plaintiff's Exhibit No. 8 now on file in this case with the records of this case.

On the map showing vessels that were warned or seized in 1891, plaintiff's Exhibit No. 6, it appears that on the 29th day of June, when the "Bessie Rutter" was warned by the U. S. S. Thetis that she also served a notice on the sealing vessels Geo. A.

White, Mattie T. Dyer, Venture, Annie F. Paint, Henry Dennis and Emmet Felitz, all engaged in seal-hunting. Actions were commenced in the District Court to recover damages for the interference with the sealing voyages of the Mattie T. Dyer, Venture, Henry Dennis and Emmet Felitz. Judgments in favor of the owners of these vessels have been recovered in each of said actions and have been paid.

Why should any relief be denied the owners of the "Bessie Rutter"? She, like the others, was on a sealing voyage, following the same herd on its way to Bering Sea and in the same zone and warned by the same vessel on the same day. At the time of her warning she was not sailing for Sand Point but was following the sealherd on its usual and direct course to Bering Sea, and if she and the other vessels referred to had not been interfered with by the defendant, can there be any question or doubt that they would have followed the seal into Bering Sea and hunted them there during the sealing season which it was stipulated "begins about the first day of July and extends to about the middle of September".

The evidence shows that after the first day of July the seal are all in Bering Sea.

Fredrick G. Dodge testified "Hunting is done to the Southward until about the first of July and after that in Bering Sea. All the fur seals are in Bering Sea after the first of July" (Transcript 36).

To the same effect is the testimony of George G. Wester (Trans. 39).

Sand Point was on or near the route followed by the seals on their way to Bering Sea and many sealing vessels stopped and rendezvoused there and the "Bessie Rutter" was only following the custom of the others. This fact is shown by Plaintiff's Exhibit No. 4, being a Government document referring to the warning of sealing vessels in the year 1891. In this document we call the Court's attention to confidential communications given by the Secretary of the Navy to Commander C. S. Cotton (see Transcript page 20, from which we quote the following):

"Orders directing Thetis, Alert and Mohican to rendezvous at Sand Point revoked. Thetis will proceed to Sand Point as directed to distribute proclamation and give notice and will proceed thence to Unalaska immediately after departure of British steamer which visits Sand Point about July first to bring home coast catch of seal. Mohican and Alert after cruising two weeks as previously directed in Bering Sea will rendezvous with Thetis at Unalaska instead of Sand Point. Marion will sail later and join your command at Unalaska at about same time. Has Thetis already sailed? If so you must communicate with her at Sand Point where her orders of yesterday directed her to await your arrival. On receipt of this order proceed immediately to Bering Sea with Thetis, Mohican and Alert. Telegraph departure.
(Signed) B. F. Tracy."

To vessels on a sealing voyage to Bering Sea, Sand Point was a favorable place to stop and in many instances a necessary one. The "Bessie Rutter" like many other sealing vessels could have intended when it cleared, to stop there for supplies, for mail, fresh

water, repairs or to ship home her spring catch of seal made along the Pacific Coast, and, therefore, having this in mind and Sand Point being in a "Great District" other than Astoria, Oregon, the home port of the "Bessie Rutter" it was necessary to clear for Sand Point so she could enter there and do what a three and one-half months' voyage on the high seas already accomplished might require to be done before she could continue her voyage to Bering Sea. The same rules applied then as applies today under Article 179 of General Regulations of the Customs and Navigation Laws which provides that "all vessels engaged in the coasting trade proceeding between ports in different great coasting districts must enter and clear."

A vessel employed in whaling, fishing or sealing was engaged in the coasting trade. A clearance for the coasting trade gives to the owner of the vessel cleared the right to hunt for seal or to fish anywhere on the high seas. Under this clearance a vessel was authorized to hunt for seal along the Pacific Coast and in Bering Sea. This right is abundantly supported by decisions of the Federal Courts and is well recognized.

"The cod fishery is a trade within the true intent and meaning of Sec. 32nd of the Act of 1793, so is the mackerel fishery. Trade in the Act is used as equivalent to occupation, employment or business for gain or profit."

The Nymph, 18 Fed. Cases, 506, Case No. 10388, 10389.

“The fishing business is a trade within the meaning of the license act of Feb. 18, 1793. The the meaning of the word trade in the Act is equivalent to employment.”

24 *Fed. Cases* 456, No. 16,004.

“The meaning of the word trade in the act is equivalent to employment.”

The Parynthe Davis, 27 *Fed. Cases*, 456.

We respectfully submit that the clearance made by the schooner “Bessie Rutter” was one which permitted her to hunt seal in Bering Sea without mentioning the fact that her voyage was for Bering Sea.

Captain Fredrick Dodge who for years was in the Coast Guard Service of the Government patrolling Bering Sea and the waters of the Pacific Coast and Alaska and whose testimony on this subject has already been referred to, testified as follows:

“A vessel under enrollment and license could be employed in the coasting trade or fisheries that is anywhere along the coast of the United States in domestic waters of all kinds. Fur seal hunting is classed as coasting trade.” (Transcript 35.)

When shown the clearance of the “Bessie Rutter” he testified that it was a “perfectly proper paper for a vessel intending to hunt seal in the Bering Sea” (page 51, Transcript).

Strong and convincing evidence that she proposed to extend her sealing voyage beyond Sand Point and into Bering Sea is shown by the fact that after the

“Bessie Rutter” was warned she went into Sand Point, reported there and cleared for the Port of Yokohama, Japan (see page 44 of Transcript). She had no cargo for Japan, she only carried her equipment for seal-hunting and the master must have had in mind to try and hunt seal on the Japan Coast not being permitted to go to Bering Sea, but later he must have learned that the sealing season on the Japan Coast closed in June, and learning this he sailed for his home port, Astoria, Oregon, where he arrived on July 20th.

Captain George G. Wester, one of the oldest and best known seal-hunters gave the following testimony:

“Along the Japanese Coast the hunting of seals ceases to be profitable about the first of June when they leave there and follow up the coast until they get home to their rookeries on Komandorski Islands.” (Trans. 39.)

We respectfully submit that the uncontradicted and unimpeached evidence conclusively proves that on the 17th day of March, 1891, the plaintiff cleared the “Bessie Rutter” on a sealing voyage for Bering Sea, and while on that voyage and on the 15th day of June, 1891, the President of the United States issued a proclamation prohibiting seal-hunting in Bering Sea and ordered a fleet of vessels to patrol the sea and to warn all vessels not to enter Bering Sea for the purpose of hunting seal, and while on said voyage and on the 29th day of June she was boarded by an officer from the U. S. S. Thetis and warned not to

enter Bering Sea to hunt seal and, acting upon this warning the master of the "Bessie Rutter" abandoned the sealing voyage to Bering Sea and returned her to her home port where she entered on July 20th, 1891.

Under these undisputed and uncontradicted facts we respectfully submit that the Court erred in finding "that at no time did said vessel engage in or undertake a voyage to Bering Sea for fur sealing" to which plaintiff duly took an exception, and erred in rejecting and refusing to adopt plaintiff's proposed finding, to wit:

"On or about the 17th day of March, 1891, the plaintiff cleared said vessel for a voyage to hunt for fur seal in the North Pacific Ocean and Bering Sea and on June 29th, 1891, while on said voyage and near the Popoff Islands in the North Pacific Ocean, she was boarded by an officer of the United States vessel 'Thetis,' who acting upon the advice of and instructions from the defendant boarded the 'Bessie Rutter' and then and there delivered to her master a warning against entering the waters of Bering Sea for the purpose of fur seal hunting on pain of the seizure and forfeiture of the said 'Bessie Rutter' for so doing. That because of such warning and threats of seizure the master of the 'Bessie Rutter' abandoned said sealing voyage into Bering Sea and returned to its home port, Astoria, Oregon, about July 20th, 1891," (Tr. 59.)

to which rejection and refusal the plaintiff duly excepted and which exception was allowed (Tr. 60).

II.

THE COURT ERRED IN FINDING FOR DEFENDANT AND IN NOT GIVING JUDGMENT TO PLAINTIFF UPON THE GROUND THAT THE UNCONTRADICTED EVIDENCE IN THE CASE ENTITLED PLAINTIFF TO A JUDGMENT IN ITS FAVOR.

At the close of the trial plaintiff made a motion asking that a judgment be entered in plaintiff's favor which motion was denied to which plaintiff duly excepted whereupon the Court made the following order:

“Motion of plaintiff heretofore herein made asking for judgment in plaintiff's favor on the ground that plaintiff established the material allegations of its complaint by uncontradicted evidence is denied, and plaintiff having duly excepted to said ruling of court, said exception is hereby allowed.

Dated this 12th day of January, 1929.

Harold Louderback, District Judge.”

(Trans. page 61.)

We have already called the Court's attention to the fact that the undisputed, uncontradicted and unimpeached evidence in the case clearly and conclusively shows that the “Bessie Rutter” on March 17, 1891, cleared for a sealing voyage to Bering Sea and while on that voyage and on the 29th day of June, 1891, she was boarded by an officer from the U. S. S. Thetis acting under instructions from the defendant and warned not to enter Bering Sea to hunt seal and acting upon such warning the master of the “Bessie Rutter” abandoned its voyage to Bering Sea and returned to its home port on July 20th, 1891. There-

fore, it is not necessary again to recite the testimony in the case which conclusively proves this to be true.

At the trial the following stipulations were entered into (see Transcript 14 and 15):

“It is further stipulated that the pelagic fur seal hunting season in the Bering Sea begins about the first day of July and extends to about the middle of September in each season (12) between the years 1886 and 1893, inclusive.

And further, that the average catch of fur seal per small hunting boat during the said season of each of the said years within that zone would have been as follows: If a boat were manned by a hunter and two seamen, the average catch for the entire season would be three hundred seals; if manned by a hunter and one seaman, two hundred seals; and if the boat were operated by one hunter alone, the average catch would be one hundred seals.

It is further stipulated, that the value of seal-skins to the owner of the sealing vessel during the year 1891 was \$14.233 per skin.

It is further stipulated, that the average cost of shooting a fur seal at the times involved in the present action was five cents per seal; and that the average cost of feeding the men constituting the crew of the vessel at the times involved was fifteen cents per day per man.

And that the defendant is entitled to a deduction from the damages allowed in the foregoing amount per day for each day that said vessel arrived at its home port—in Puget Sound prior to September 22, or at San Francisco prior to September 27.”

Because of the warning served upon the Bessie Rutter by the U. S. S. Thetis its voyage into Bering

Sea for the full sealing season from July 1st to September 15th was interfered with and terminated and its prospective catch of fur seals therein estimated by said stipulations at 300 seals for each of the three-men hunting boats or a total of 1200 skins of the net average value of \$14.233 per skin, as stipulated, was prevented to the damage of plaintiff in the sum of \$17,079.60 from which, under said stipulations, is to be deducted five cents per seal, cost of shooting amounting to \$60.00, also a deduction of 15 cents per day, as stipulated, for feeding fourteen members of the crew seventy-one days amounting of \$149.10. This would leave a total of \$16,870.50 for which sum judgment should have been rendered in plaintiff's favor and we move the Court that it direct that a judgment in that amount be entered in plaintiff's favor.

Plaintiff has been put to heavy costs in trying this case twice in the District Court and for the two appeals taken to this Court, none of which can be recovered against the Government. It being admitted and so found by the trial court in its Finding III that the "Bessie Rutter" "was boarded by an officer of the United States vessel 'Thetis' upon the advice and instructions of the defendant and that a warning and prohibition was then delivered to the master of the 'Bessie Rutter' by said officer of the 'Thetis' against entering the waters of Bering Sea for the purpose of fur sealing" and it having been stipulated what the prospective catch of seal would have been and also stipulated what the expenses of making the

catch would have been there is no good reason why judgment should not be entered in plaintiff's favor and save it the costs of another trial.

The Supreme Court or a Circuit Court of Appeals may affirm, modify or reverse any judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require (U. S. Rev. S. Sec. 701).

The Circuit Court of Appeals may in reversing a decision of the District Court in an action at law direct the Court to enter a judgment for the plaintiff for a stated sum. In the case of *Rosenfeld v. Scott*, an action brought under an Act of Congress permitting a person who had paid a tax on a trust estate to recover the amount paid the Court in rendering its decision said:

“The judgment is reversed with directions to the court below to enter judgment in favor of plaintiff for \$2,998.80 with interest and costs.”

Rosenfeld v. Scott, Collector of Internal Rev.,
245 Fed. 646.

A recent decision on the point under consideration is that of *Bank of Waterproof v. Fidelity & Deposit Co.*, 299 Federal Reporter 481. In its decision the Court says:

“The plaintiff in error has filed a motion that judgment be entered by this court in its favor. The motion will be granted. The jury having been waived, and that Court having reached the conclusion that the plaintiff in error was entitled to a judgment there is no reason for remanding

the cause for further consideration by the District Court.”

Insurance Companies v. Boyken, 12 Wall. 433;

Fellman v. Royal Ins. Co., 184 Fed. 577;

Walter v. Gulf & Interstate Ry. Co., 269 Fed. 85.

“It is therefore ordered that the clerk of this Court enter a judgment for the plaintiff in error for \$5,000 that being the amount of the bond sued on, together with interest thereon at the rate of 5 per cent. per annum from the date suit was filed, and certify such judgment to the District Court.”

Of all of the sealing cases that have been tried in which judgments have been rendered in plaintiff's favor we consider this case as meritorious as any of them. The uncontradicted evidence proves a voyage to Bering Sea to hunt for fur seal and Government records offered in evidence show that while the “Bessie Rutter” was on that voyage she was boarded by a U. S. naval officer who, acting under instructions, warned her master not to enter Bering Sea to hunt for seal and because of such warning and interference the master abandoned the voyage and returned to the home port. The stipulations entered into at the trial clearly establish the damages suffered by plaintiff because of such interference and quoting from this Court's decision applying to this case, in reversing the decision of Judge Bourquin when this

case with other sealing cases was passed upon in the *Bird* case, hereinbefore referred to,

“That an affirmance of the judgment would result in a miscarriage of justice.”

Respectfully submitted,

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